HERBERT HERRMANN

IBLA 78-407 Decided January 14, 1980

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting amended Native allotment application A-055659 (Parcel D).

Set aside and remanded.

1. Alaska: Native Allotments -- Applications and Entries: Filing -- Equitable Adjudication: Generally

Where a State Office rejects a Native allotment application because it was not timely filed and did not have the required certification and land description, and where it is shown such deficiencies were beyond applicant's control, the case will be remanded to the State Office to allow 60 days for the deficiencies to be cured, and for the State Office, if it finds substantial compliance with the law, to apply doctrine of equitable adjudication and then to accept the application with the late filing, proper certification, and amended land description, all else being regular.

APPEARANCES: Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Herbert Herrmann appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his amended Native allotment application A-055659, filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act (ANSCA) of December 18, 1971, 85 Stat. 688, 43 U.S.C.A. §§ 1601-1628 (West Supp. 1978)).

Appellant's original application for 29.64 acres of land along the King Salmon-Naknek Road was filed with BLM on September 13, 1961. An amended application was filed on November 2, 1961, which increased the size of the parcel to 49.09 acres, and the parcel was subsequently referred to as Parcel A. On both applications the Bureau of Indian Affairs (BIA) certified that appellant was a Native entitled to an allotment under the appropriate regulations. On December 19, 1963, BLM accepted the application, noting that BIA had certified appellant as a Native qualified to make application for an allotment under the Act, supra.

On December 29, 1970, another amended application certified by BIA was filed for Parcel B consisting of 23.51 acres adjacent to Parcel A.

Appellant sought approximately 10 more acres in his application for Parcel C filed with BLM November 1, 1971, which had also been certified by BIA. On December 21, 1977, application for Parcel D was filed in which appellant stated that he wished his allotment to total 77.40 acres.

In its decision rejecting the application for Parcel D, the State Office held that the application was not timely filed and that to allow the filing of a new Native allotment application at this late date would abuse the intent of section 18 of ANSCA, supra. The State Office further found that the application was incomplete and unacceptable for two reasons: 1) It was not certified by BIA as required by 43 CFR 2561.1(d) and, 2) the application contained an improper and unacceptable land description. Appellant timely appealed BLM's rejection of his application for Parcel D.

Appellant makes three separate arguments on appeal. Under the first point, appellant refers to section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976), which provides that any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued in accordance with the 1906 Act. Appellant contends that his application was pending. Appellant states that the phrase "pending before the Department of the Interior on December 18, 1971," means on file before an agency of the Department including BIA. In support of this contention appellant quotes from a memorandum dated October 18, 1973, from the Assistant Secretary of the Interior, Jack O. Horton, to the Director of BLM (hereinafter referred to as "October 18, 1973 Guidelines") in which the phrase "pending before the Department on December 18, 1971," was construed as follows: "This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. [18 October 1973 Guidelines, p. 1; emphasis supplied.]"

Appellant concludes that his application was "pending" and must be considered on its merits as it was filed with BIA 10 months prior to December 18, 1971. Appellant's explanation as to why the application was not filed with BLM is as follows: He submitted an original completed application for Parcel D. He then made corrections on a draft which he resubmitted to BIA in order for it to prepare a final draft for his signature and subsequent transmittal to BLM. The time stamps on the first and last pages show that BIA received it on February 8, 1971, but BIA neglected to prepare a final draft for submission to BLM. Appellant states that the timestamp is proof that the document was filed with BIA by February 8, 1971, and again refers to the October 18, 1973, Guidelines for support:

> Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [18 October 1973 Guidelines, p. 1-2; emphasis supplied.]

Therefore, appellant reasons, his application was properly filed with BIA within the time required.

As for the sufficiency of the application, appellant points out that his applications for Parcels A, B, and C reveal that he was certified as a Native qualified to make application under the Act, supra. He notes that every amendment to his original application has been processed under the number A-055659.

Regarding certification of occupation, posting, and absence of conflict, he says that BIA did attach a statement submitted by him with his application in February 1971 and signed by three witnesses verifying that he had occupied and posted the land claimed on the application, and that his claim did not infringe on other Native claims or community use. Therefore, appellant asserts, BIA had sufficient information in February 1971 to make the certification provided for in 43 CFR 2561.1(d), and it was purely an oversight that BIA did not affix the certification stamp. Appellant submitted an affidavit of Mary Goch, Realty Officer, BIA, who certified appellant as a qualified Native under section 2561.1(d) and stated that such certification could have been made as of February 8, 1971.

Under the second point, appellant discusses the fiduciary relationship existing between the United States and the Native Americans. He asserts that it would be inconsistent with the trust responsibilities of the United States towards appellant for it to deny him an

opportunity to have his application considered on the merits because of an administrative error of a sister agency. Appellant also cites cases supporting the principle that Federal statutes relating to Native affairs should be construed to give maximum benefit to the Natives.

Appellant points out the Department of the Interior has, since the implementation of the Native Allotment Act, supra, required its officials to assist the applicants in the completion of their applications. He reviewed the application process employed by BIA: The application was filed with BIA so that it could establish the applicant's eligibility and make other certifications prior to its submission to BLM; BIA gave instructions in how to complete the forms and from the applicant's rough draft, actually prepared the application form and developed the legal description; the application was taken in rough draft form so that information provided by applicant could be typed onto the blank forms and submitted to BLM. Appellant said that he had complied with BIA's system but that his amendment was not processed due to BIA's oversight.

Finally, for his third point, appellant asserts that the irregularity in his application was the result of obstacles over which he had no control. Therefore, appellant contends that the Board should invoke 43 CFR 1871.1-1, the regulation dealing with equitable adjudication, and remand the case to BLM for consideration of the application on its merits.

In the alternative, appellant requests a hearing on the issues of fact involved. Appellant notes that in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court established the due process right of a Native allotment applicant to an oral hearing prior to adverse proceedings taken against his or her allotment.

The file shows that Mary Goch, Realty Officer of BIA, filed an affidavit dated May 15, 1978 (Exhibit F), stating:

> 1. That my name is Mary Goch and I am employed as a Reality [sic] Officer of the Bureau of Indian Affairs, an agency of the U.S. Department of the Interior, Anchorage Agency, Anchorage, Alaska.
>
> 2. That I have reviewed our enrollment records and certify that Herbert E. Herrmann is a Native qualified to apply for a Native Allotment under the Native Allotment Act and 43 CFR 2561.1(d).
>
> 3. That I have reviewed our records of Native Allotment applications, and I certify that Herbert E. Herrmann had his Allotment application: A-055659, Parcel D on

> file with the Bureau of Indian Affairs before the deadline date of December 18, 1971.
>
> 4. That we had sufficient information, as reflected in that file, to certify - pursuant to 43 CFR 2561.1(d) - that Herman E. Herrmann had occupied and posted the lands as stated in his Parcel D application, and that his claim did not infringe on other Native claims or area of community use. And that this certification could have been made as of February 8, 1971.

The file also contains a letter dated December 20, 1977, from the same Mary Goch, BIA, to BLM (Exhibit B-1), stating:

> Enclosed is a amended application from Herbert Herrmann, Parcel D, which was timely filed with the Bureau of Indian Affairs in 1971. However, due to an oversight it was not submitted to the Bureau of Land Management.
>
> We are requesting this application to be added to Mr. Hermann's file so that it may be field examined and eventually certificated.

This amended application, stamped as received by BIA on February 8, 1971, from appellant described the land sought as: "Parcel d: Township 18 South, Range 44 West, Section 9. Wish this allotment to be a total of 77.40 acres. See enclosed map." Attached to this amended application is an affidavit dated February 3, 1971, date stamped as received by BIA on February 8, 1971, signed by three persons, which reads: "We, the undersigned, certify that Herbert Herrmann has occupied, marked and posted the land applied for as a Native allotment; and that this land is not claimed by any other Native; and is not an area of Native community use." Attached to these papers also is a sheet headed "Township 18 South Range 44 West Section 9" and containing a sketch apparently of land which bears a "9" on it. In its decision of March 29, 1978, the Alaska State Office had stated no map had been enclosed. The State Office apparently overlooked the map because it was placed backward in the case file. Moreover, it was placed in such a manner that the case file fastener obscured the township, range and section description.

There is also in the file a memorandum dated April 18, 1978, to BLM from BIA (Exhibit E), which states the following:

> Your decision of March 29, 1978 to reject Herbert Herrmann's application for Parcel "D" appears arbitrary.

The application was filed with the Department of the Interior, Bureau of Indian Affairs, on February 8, 1971, which is clearly within section 18 of ANCSA.

You quote Departmental Regulation 43 CFR 2561.1(d) the applicant has not been Certified by the Bureau of Indian Affairs.

We would like to point out that the Bureau of Indian Affairs Certified the applicant on December 23, 1970 when his application for Parcel "B" was submitted. How many times does an applicant need to be Certified?

Attached to our letter of December 20, 1977 was a Certification by the applicant that he occupied, marked and posted this land and the land was not used by any other Native nor was it a Native community area. It was signed by three witnesses and time stamped February 8, 1971.

Also attached to our letter was a sketch of this parcel.

You are correct in stating the legal description is unacceptable; however, this office has been in contact with Mr. Herrmann and a corrected legal description will be submitted in the near future.

For the purpose of the application it is immaterial how many lodges Mr. Herrmann wishes to build.

Question number 7 on the application does not apply and is marked "no".

To reject Parcel "D" at this time is clearly ignoring 43 CFR 2561.0-2.

This office is requesting that the Bureau of Land Management reverse the rejection at this time and allow the applicant additional time to submit the required information.

We note from the above that appellant apparently timely filed his application with BIA for Parcel D but for some unknown reason, through no fault of his, it was filed late with BLM. Moreover, the description does not point out which land comprised the 77.40 acres in Parcel D out of the 640 acres in sec. 9.

43 CFR 1871.1-1 provides for equitable adjudication where there has been substantial compliance with the law. It reads:

The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:

> (a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not affected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district, in which the land is situated, and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith there being no lawful adverse claim.

This Board invoked the equitable adjudication regulation in Julius F. Pleasant, 5 IBLA 171 (1972), a similar case in which Natives delivered their applications to BIA within the time required, but BIA held them past the time when they were required to be filed with BLM. This Board found that the error or deficiency was satisfactorily explained as being the result of some obstacle over which the parties had no control, and held that the applications be reinstated and the case remanded for further consideration in accordance with equitable adjudication. We find the same reasoning applicable here.

In the circumstances herein, BIA would have to certify as to appellant's exclusive use and occupancy of the land in question. In addition, the description of the land sought should be changed so that the description is complete and fully identifies the land. Further, BLM should check the application to see if there are any other deficiencies. We shall remand the case to BLM to give 60 days for the discrepancies in the application to be cured. If BLM then finds there has been substantial compliance with the law, it may invoke the doctrine of equitable adjudication and may then accept the application with the late filing, a proper certification, and the amended description of the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further processing consistent with this decision.

Anne Poindexter Lewis
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Frederick Fishman
Administrative Judge